

## REPORT DOCUMENTATION PAGE

Form Approved  
OMB No. 0704-0188

Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188), Washington, DC 20503.

1. AGENCY USE ONLY (Leave blank)			2. REPORT DATE	3. REPORT TYPE AND DATES COVERED
			15.Jul.02	MAJOR REPORT
4. TITLE AND SUBTITLE			5. FUNDING NUMBERS	
EUROPEAN UNION, NATO SOFA, AND THE CHALLENGES AHEAD FOR US MILITARY OPERATIONS				
6. AUTHOR(S)				
MAJ MCCORMICK MICHAEL J				
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)			8. PERFORMING ORGANIZATION REPORT NUMBER	
JA GENERAL SCHOOL ARMY			CI02-152	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)			10. SPONSORING/MONITORING AGENCY REPORT NUMBER	
THE DEPARTMENT OF THE AIR FORCE AFIT/CIA, BLDG 125 2950 P STREET WPAFB OH 45433				
11. SUPPLEMENTARY NOTES				
12a. DISTRIBUTION AVAILABILITY STATEMENT			12b. DISTRIBUTION CODE	
Unlimited distribution In Accordance With AFI 35-205/AFIT Sup 1				
13. ABSTRACT (Maximum 200 words)				
20020829 022				
14. SUBJECT TERMS			15. NUMBER OF PAGES	
			62	
			16. PRICE CODE	
17. SECURITY CLASSIFICATION OF REPORT	18. SECURITY CLASSIFICATION OF THIS PAGE	19. SECURITY CLASSIFICATION OF ABSTRACT	20. LIMITATION OF ABSTRACT	

## **EUROPEAN UNION, NATO SOFA, AND THE CHALLENGES AHEAD FOR UNITED STATES MILITARY OPERATIONS**

**MAJOR MICHAEL J. MCCORMICK\***

---

\* Judge Advocate, United States Air Force. LL.M. Candidate, The Judge Advocate General's School, Charlottesville, Virginia; J.D., 1991, Gonzaga University School of Law; B.A., 1987, University of Colorado, Boulder. Previous assignments: Chief of Civil Law, Air Force Space Command, Peterson Air Force Base, Colorado; Chief of Military Justice and Chief of Civil Law, 341<sup>st</sup> Space Wing, Malmstrom Air Force Base, Montana; Area Defense Counsel, Elmendorf Air Force Base, Alaska; Chief of Labor Law, 3<sup>rd</sup> Wing, Elmendorf Air Force Base, Alaska; Chief of Legal Assistance and Claims Officer, Lowry Training Center, Lowry Air Force Base, Colorado. Member of the bars of Colorado and the United States Court of Appeals for the Armed Forces. This article was submitted in partial completion of the Master of Laws requirements of the 50th Judge Advocate Officer Graduate Course.

## DRAFT

### I. Introduction

Most Americans first heard of the European Union with the mandatory introduction of the Euro into 12 of its member countries on 1 January 2002.<sup>1</sup> However, the European Union has been in existence for the latter half of the 20<sup>th</sup> Century. As a European Union commentator has stated,

For some it is simply a set of intergovernmental institutions, useful for specific purposes, but without any wider implications. For others, it is a device in a strategy which has lost its purpose: that of cornering the USSR or containing Germany; for others it is a delusion of European unity which now has to be thrown off in order to preserve the natural and enduring primacy of the nation states; others think it is the transcending of evil in the lives of nations, a unity which reflects the greater good for individuals. Finally, there is the view that it is none of these, that it is something unique in relations between states which have retained their sovereignty and equality.<sup>2</sup>

It is still too early to tell if the European Union will become a major super power as some predict may happen.<sup>3</sup> However, the potential is there given the combined influences of the

---

<sup>1</sup> European Union, *Euro Essentials* at <http://europa.eu.int/euro/html/home5.html?lang=5>. (last visited Mar. 18, 2002) [hereinafter Euro Essentials].

<sup>2</sup> PAUL TAYLOR, THE EUROPEAN UNION IN THE 1990'S 1 (1996).

<sup>3</sup> Barbara Crutchfield George, Paul L. Frantz, and Jutta Birmele, *The Dilemma of the European Union: Balancing the Power of the Supranational EU Entity against the Sovereignty of its Independent Member Nations*, 9 PACE INT'L L. REV 111, 111-112 (1997).

DRAFT

15 member nations.<sup>4</sup> If its potential is realized, the European Union could supplant the North Atlantic Treaty Organization (NATO) as the major political and military alliance in Europe. While the European Union's goal is to complement NATO in the areas of foreign security, tensions between the two organizations are inevitable. One potential tension is found in the application of the NATO Status of Forces Agreement (SOFA).<sup>5</sup> The NATO SOFA, a treaty that has served the purpose of peacetime basing of forces so well for almost fifty years, may need to adapt to ever increasing European Union laws. The NATO SOFA, born primarily out of a desire to make the military commander's job easier in relation to foreign nation laws, could increasingly become unworkable unless possible EU-NATO contradictions are worked out.

This article first looks at Status of Forces Agreements (SOFAs) in general. These agreements are generally an innovation of the 21<sup>st</sup> Century with no historical counterpart. The article then briefly examines the origins North Atlantic Treaty<sup>6</sup> and the North Atlantic Treaty Organization (NATO). The NATO SOFA is then discussed, both in its origins and its provisions. This article then looks at the European Union. A detailed examination of this complicated organization is beyond the scope of this paper, but hopefully the reader will come away with an overview of the history of the European Union and an understanding of

---

<sup>4</sup> Currently the member nations are: Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland, Sweden, and United Kingdom. Candidate countries are Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, and Slovenia. List available from the EU official web site: European Union, *Europa*, <http://europa.eu.int/> [hereinafter Europa].

<sup>5</sup> North Atlantic Treaty Organization Status of Forces Agreement, 19 June 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA].

<sup>6</sup> North Atlantic Treaty, Apr 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

## DRAFT

jurisdiction.<sup>10</sup> Host nation consent for stationing and transit of the forces can be either through formal or informal means.<sup>11</sup> With the permanent stationing of forces abroad after World War II, consent from each individual country as a basis for stationing forces abroad was seen as a wieldy and unworkable process. The birth of NATO gave the basis for a multilateral treaty among its member nations for the foreign basing of each other's troops.

### III. The NATO SOFA

To understand the NATO SOFA, one must first basically understand NATO itself. The Alliance in World War II and the post-war division of Europe into Western and Eastern blocks made the collective self-defense of North America and Western European countries a real and urgent necessity.

#### A. The North Atlantic Treaty

##### 1. *Origins*

The origins of the proposal for a western European and North American alliance came from Winston Churchill's famous "Iron Curtain" speech in 1946 at Fulton, Missouri.<sup>12</sup> Across Europe, there was a sense of urgency for collective security treaty discussions due to

---

<sup>10</sup> *Id.* at 529. *See also* WOODLIFFE, *supra* note 7, at 35.

<sup>11</sup> WOODLIFFE, *supra* note 7, at 35.

<sup>12</sup> ESCOTT REID, TIME OF FEAR AND HOPE: THE MAKING OF THE NORTH ATLANTIC TREATY, 1947-1949 at 29 (1977).

DRAFT

the Soviet threat.<sup>13</sup> The original countries involved in discussions were Belgium, France, Luxembourg, the Netherlands and the United Kingdom.<sup>14</sup> Other countries were invited to join the treaty discussions due to their status as “Stepping Stone” countries. In other words, locations from which United States and Canadian military forces could reach Europe quickly.<sup>15</sup> These countries were Norway (for Spitzbergen), Denmark (for Greenland), Portugal (for the Azores), and Iceland.

The United States initially opposed inclusion into any alliance.<sup>16</sup> Congressional sentiment was against adding military and political commitments to the existing financial commitments of the Marshall Plan.<sup>17</sup> However, the closing of Berlin and the Berlin Airlift resulted in the American support for a treaty of collective defense against the Soviet threat.<sup>18</sup> The treaty drafting and negotiation process was lengthy and difficult.<sup>19</sup> The initial meetings produced the outline of a collective defense agreement for the North Atlantic.<sup>20</sup> After working drafts were created, numerous intergovernmental meetings took place from March

---

<sup>13</sup> *Id.* at 49-50.

<sup>14</sup> NORTH ATLANTIC TREATY ORGANIZATION, NATO HANDBOOK 29 (2001), available at <http://www.nato.int/docu/handbook/2001> [hereinafter NATO Handbook].

<sup>15</sup> REID, *supra* note 12, at 195.

<sup>16</sup> *Id.* at 38.

<sup>17</sup> *Id.* at 41.

<sup>18</sup> *Id.* at 51.

<sup>19</sup> *Id.* at 45.

<sup>20</sup> *Id.* at 46.

DRAFT

1948 to March 1949.<sup>21</sup> The final product was the result of vetting by foreign services, political bodies, and military advisors to the member states.<sup>22</sup> As a Canadian participant observed, the North Atlantic Treaty was much more than a collective defense agreement, it “was considered by its architects as a warning from the governments of the North Atlantic countries to Joseph Stalin.”<sup>23</sup> The Treaty was signed on 4 April 1949.<sup>24</sup>

Fortunately, the United States Government was fully engaged on the treaty by the time it reached the Senate for ratification. In fact, by the time the treaty had been signed, the Senate Foreign Relations Committee knew the treaty inside out and had a vested interest in its ratification.<sup>25</sup> The Foreign Relations Committee of the Senate approved the Treaty on June 6, 1949.<sup>26</sup> The Senate approved the Treaty on 21 July 1949.<sup>27</sup> The North Atlantic Treaty came into force on 24 August 1949.<sup>28</sup>

## 2. *Current Status*

---

<sup>21</sup> *Id.* at 45.

<sup>22</sup> *Id.* at 143.

<sup>23</sup> *Id.* at 22. Escott Reid was the undersecretary of foreign policy for Canada.

<sup>24</sup> North Atlantic Treaty, *supra* note 6.

<sup>25</sup> Theodore Achilles, *Beyond Diplomacy*, FOR. SERVICE J., April 1963, at 54.

<sup>26</sup> North Atlantic Treaty, *supra* note 6.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

## DRAFT

The world today is much different from the world of 1949. The Soviet Bloc has disintegrated. Much of the former Warsaw Pact is now part of the Partnership for Peace.<sup>29</sup> Whether NATO is still a force in this changed world has been the subject of debate.<sup>30</sup> However, the United States still permanently bases approximately 100,000 of its military personnel in Europe.<sup>31</sup> Thus, the NATO SOFA, created shortly after the birth of NATO, is still a relevant treaty.

### B. Origins of the NATO SOFA

The leaders of the NATO countries knew that the World War II policy of granting sweeping immunities to visiting forces would not suffice in peacetime. The NATO SOFA was the answer. The SOFA was “a balanced agreement based upon reciprocity which more or less precisely defined the rights, duties, and obligations of a visiting force while stationed in the host state.”<sup>32</sup> Charles E. Wilson, Secretary of Defense for the Eisenhower Administration, outlined the creation of the SOFA in his testimony before the Senate Foreign Relations Committee:

The idea of a multilateral status of forces agreement for the North Atlantic Treaty Organization was first given impetus in the Department of Defense. The need for such an agreement became very apparent to the Department

---

<sup>29</sup> NATO HANDBOOK, *supra* note 14, at 67.

<sup>30</sup> *Id.*

<sup>31</sup> Department of Defense, *United States Security Strategy for Europe and NATO* at <http://www.defenselink.mil/pubs/europe/#t>. (last visited Mar. 18, 2002).

<sup>32</sup> ROBERT B. ELLERT, NATO “FAIR TRIAL” SAFEGUARDS: PRECURSOR TO AN INTERNATIONAL BILL OF PROCEDURAL RIGHTS 2 (1963).

DRAFT

early in 1950 not long after the North Atlantic Treaty had come into effect. Each time the United States approached on the issue of the NATO countries concerning the construction of a base or the stationing of a unit in one of those countries, we would be faced by vexing problems of status which would delay negotiations and cause difficulty, particularly because there was no uniform or generally accepted standard for solution of these problems.<sup>33</sup>

The NATO SOFA was the result of the need for an agreement between the NATO member countries. Walter Bedell Smith, Under-Secretary of State, noted that "It is the first time, I think, in history that in peacetime a United States Congress has been asked to ratify a treaty which covers the legal status of large groups of American troops abroad."<sup>34</sup> In order to facilitate multilateral agreement, the SOFA was expected to be a "a two-way street. . . . We [United States] expect the same treatment in these nations that we are going to give their nationals when they are here."<sup>35</sup> One of the primary purposes was to reduce to a minimum the disputes between countries, which send troops, and countries, which receive them. Another important purpose of the SOFA was reducing the administrative burden on the troop commander in dealing with host nation laws.<sup>36</sup>

The NATO SOFA was not without controversy during its Senate hearings. There was concern that the SOFA needed to protect American taxpayer financial interests by not

---

<sup>33</sup> *Status of the North Atlantic Treaty Organization, Armed Forces, and Military Headquarters: Hearings Before the Senate Committee on Foreign Relations*, 83<sup>rd</sup> Cong. 10-11 (1953) [hereinafter NATO SOFA Hearings].

<sup>34</sup> *Id.* at 2.

<sup>35</sup> *Id.* at 12 (statement of Charles E. Wilson, Secretary of Defense).

<sup>36</sup> *Id.* at 3 (statement of Walter Bedell Smith, Under-Secretary of State).

DRAFT

exposing the United States to high dollar judgments in foreign countries.<sup>37</sup> While the Senate expressed concern about financial claims under the SOFA, the biggest controversy of the SOFA was Article VII's provisions regarding criminal jurisdiction.<sup>38</sup> A question from one Senator regarding the claims process of the SOFA quickly turned into persistent questioning regarding the SOFA's criminal jurisdiction protections for American service members.<sup>39</sup> The response from the State Department and Defense Department was that compromise in the area of criminal jurisdiction was necessary to placate the European allies who would be the bases of most of the foreign troops. Those European countries with civil law systems sought the greatest compromise between their criminal justice system and the common law justice systems of countries such as the United States. Certain relinquishments of rights by American service members such as right to jury trial were seen as a valid compromise with the civil law based countries.<sup>40</sup>

The debate on criminal jurisdiction resulted in the only reservation proposed to the NATO SOFA. The reservation proposed by Senator John Bricker would have stated that exclusive criminal jurisdiction would have been with the sending state. The State and

---

<sup>37</sup> *Id.* at 18 (statement of Senator William F. Knowland).

<sup>38</sup> NATO SOFA, *supra note 5*, at art.VII.

<sup>39</sup> NATO SOFA Hearings, *supra note 33*, at 18-32.

<sup>40</sup> *Id.* at 33 (statement of General Omar Bradley, Chairman of the Joint Chiefs of Staff). An interesting parallel to today was that several European countries strongly criticized the severity of the United States criminal judicial system. *Id.* at 46 (statement of Walter Bedell Smith, Under-Secretary of State).

## DRAFT

Defense Departments strongly opposed the reservation. The Senate eventually dropped the reservation.<sup>41</sup> However, the jurisdictional compromise remained controversial to some:

In 1951, one hundred and seventy-five years after our people secured their independence and were protected by the Bill of Rights, our Department of State negotiated for the surrender of the birthrights of those who wear the uniform of the United States. . . the Senate of the United States ratified a vicious treaty that defamed and disparaged the rights of freeborn men who happen to be in the service of this formerly sovereign country.<sup>42</sup>

In spite of the controversy, the Senate ratified the NATO SOFA on July 15, 1953.<sup>43</sup> It was a significant document in the history of international agreements. The SOFA, especially its criminal jurisdiction provisions, has provided a model agreement for a large number of jurisdictional arrangements for visiting forces operating outside the NATO area of operations.<sup>44</sup>

### C. Provisions of the NATO SOFA

The NATO SOFA consists of twenty articles. It covers topics from the carrying of arms<sup>45</sup> to criminal jurisdiction.<sup>46</sup> Its drafters designed the SOFA to be as comprehensive as

---

<sup>41</sup> *Id.* at 38 (memorandum prepared by Department of Justice entitled “International Law and the Status of Force Agreement), 57 (letter to Senator Bricker from Secretary of Defense Charles E. Wilson).

<sup>42</sup> SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 129 (1971) (*citing* Bennett and Kirk, *Tyranny by Treaty*, THE JUDGE ADVOCATE GENERAL JOURNAL, July 1955). Serge Lazareff was the legal advisor to the Allied Forces, Central Europe. His treatise on the status of military forces was the first and probably still the most authoritative commentary on the NATO SOFA.

<sup>43</sup> NATO SOFA *supra* note 5.

<sup>44</sup> G.I.A.D. DRAPER, CIVILIANS AND THE NATO STATUS OF FORCES AGREEMENT 184 (1966).

<sup>45</sup> NATO SOFA *supra* note 5, art VI.

DRAFT

possible.<sup>47</sup> However, most of the NATO countries have supplemented the SOFA with either a supplementary agreement,<sup>48</sup> memorandum of understanding<sup>49</sup> or in the case of the United Kingdom, a unilateral statute.<sup>50</sup> This section is not meant to be an exhaustive treatment of each SOFA article, but only an overview of the major issues associated with the major articles.

*1. Scope*

The NATO SOFA is one of only two fully reciprocal SOFAs to which the United States is a party.<sup>51</sup> Thus, the terms apply to the United States not only as a state stationing troops in the other NATO country (in which situation the United States is referred to as the “Sending

---

<sup>46</sup> *Id.* at art.VII.

<sup>47</sup> Peter Rowe, *Historical Developments Influencing the Present Law of Visiting Forces*, in THE HANDBOOK OF THE LAW OF VISITING FORCES 21 (Deiter Fleck ed., 2001).

<sup>48</sup> Status of Forces Agreement with Federal Republic of Germany, August 3, 1959, 14 U.S.T. 531, 481 U.N.T.S. 262 [hereinafter German SOFA].

<sup>49</sup> See, e.g., Memorandum of Understanding Between the Ministry of Defense of the Republic of Italy and the Department of Defense of the United States of America Concerning the Use of Installations/Infrastructure by U.S. Forces in Italy, Feb. 2, 1995, at <http://www.usembassy.it/usssso/files/shell.pdf>.

<sup>50</sup> Richard J. Erickson, *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F. L. REV. 137, 144 n.30 (1994).

<sup>51</sup> *Id.* at 152 n 45. The other reciprocal SOFA is the Partnership for Peace SOFA. Additional Protocol to the Agreement Among the States Parties to the North Atlantic Treaty and Other States Participating in the Partnership for Peace Regarding the Status of their Forces, Jun. 19, 1995, T.I.A.S. No. 12666, NATO, *NATO On-line Library*, <http://www.nato.int/docu/basics.htm#II-C> (last visited Mar. 20, 2002). See also INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK (2002).

DRAFT

State”), but also to the less common situation where NATO troops are stationed in the United States (the United States then becomes the “Receiving State”).<sup>52</sup>

## 2. *Articles of the NATO SOFA*

### a. *Article I: Definitions*

The first article of the NATO SOFA provides a definition of commonly used terms. Nothing in this article bears mention except for the term “Civilian Component.” This term does not refer to dependents or contractors, but civilian personnel who accompany the force and who are employed by the force.<sup>53</sup>

### b. *Article II: Law of the Receiving State*

Article II contains the seemingly simple language instructing the sending state to respect the laws of the receiving state, and to refrain from any political activity.<sup>54</sup> However, this Article is more complicated than it seems on a first reading. The article has been the source of discussion and controversy.<sup>55</sup> Serge Lazareff, one of the drafters of the SOFA, has argued that the language of Article II was only meant to be psychological, setting the spirit and desire for the armed forces of the parties to live in peace with the people of the receiving

---

<sup>52</sup> NATO SOFA, *supra* note 5, art. I, (defining the words “Sending State” and “Receiving State”).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at art. II.

<sup>55</sup> Rodney Batsone, *Respect for the Law of the Receiving State*, in THE HANDBOOK OF THE LAW OF VISITING FORCES, *supra* note 47, at 62.

DRAFT

state.<sup>56</sup> Others argue that Article II imposes an obligation under international law to respect the law of the receiving state.<sup>57</sup> Thus, a violation of Article II would be a violation of international law and the receiving state could refer the dispute to available international tribunals for resolution.<sup>58</sup>

Debating the exact meaning of Article II is beyond the scope of this article, however at a minimum, the sending state must attempt to respect the laws of the receiving state as long the specific SOFA terms are not violated. The crucial question is how much is “respect”? Does it mean that the same as “obey”? While Lazareff’s interpretation carries weight, it seems illogical to use the word “respect” for setting the tone of the SOFA. The better practice would have been to put tone-setting words in a preamble.

*c. Article III: Entry and Departure*

Generally, Article III exempts the Sending State members from passport and visa regulations and immigration regulations.<sup>59</sup> This article is based on the concept that the receiving state has granted permission for entry (*ius ad praesentiam*).<sup>60</sup> With this

---

<sup>56</sup> LAZAREFF, *supra* note 42, at 100-01.

<sup>57</sup> Rodney Batsone, *Respect for the Law of the Receiving State*, in THE HANDBOOK OF THE LAW OF VISITING FORCES, *supra* note 47, at 69.

<sup>58</sup> *Id.*

<sup>59</sup> NATO SOFA, *supra* note 5, art. III.

<sup>60</sup> Frank Burkhardt, *Entry and Departure of Military Personnel*, in THE HANDBOOK OF THE LAW OF VISITING FORCES, *supra* note 47 at 71.

DRAFT

permission, members of the sending state's armed force only have minimal entry and departure requirements.<sup>61</sup>

*d. Article IV: Driving Permit*

This SOFA article deals with the mobility of the sending force and its personnel. Most states have followed option (a) of Article IV and accepted the driver's permit or license issued by the sending state to its member of the force or of a civilian component.<sup>62</sup> Either through that option or option (b) of the sending state office issuing a permit or license without a test,<sup>63</sup> Article IV was designed "to contribute to the mobility of the forces by preventing their members from applying for a driving license in every Member State of the Alliance. This mobility is essential for the strategic concept of a unified defense and represents one of the basic purposes of the SOFA."<sup>64</sup>

*e. Article V: Uniform, Service Vehicles*

Article V is a straightforward provision requiring the normal wear of uniforms and the placement of a distinctive nationality mark on service vehicles. There has not been any notable controversy regarding this Article.

---

<sup>61</sup> NATO SOFA, *supra* note 5, art. III.

<sup>62</sup> LAZAREFF, *supra* note 42, at 121.

<sup>63</sup> NATO SOFA, *supra* note 5, art. III.

<sup>64</sup> LAZAREFF, *supra* note 42, at 120.

## DRAFT

### *f. Article VI: Arms*

The NATO SOFA briefly addresses the permission given by the receiving state to the sending state's military forces to carry arms.<sup>65</sup> Members of the civilian component, however, were not authorized by Article VI to carry arms. Any such authority for members of the civilian component is determined by supplemental agreement.<sup>66</sup> The drafters of Article VI also intended the laws of the receiving state to govern the carrying of personal arms by members of the sending state.<sup>67</sup> Finally, the use of force is not governed by this article or any article of the NATO SOFA.<sup>68</sup>

### *g. Article VII: Jurisdiction, Military Police*

As previously stated, Article VII was and remains one of the most contentious articles of the NATO SOFA. Article VII first sets out the jurisdictional scheme for criminal offenses. Conduct which is an offense under the law of the sending state, but not the receiving state, results in exclusive jurisdiction of the sending state.<sup>69</sup> The opposite situation results in exclusive jurisdiction for the receiving state.<sup>70</sup> The more difficult situations occur when both

---

<sup>65</sup> NATO SOFA, *supra* note 5 art. VI.

<sup>66</sup> LAZAREFF, *supra* note 42, at 127.

<sup>67</sup> *Id.* at 125.

<sup>68</sup> Eckhard Heth, *Arms*, in THE HANDBOOK OF THE LAW OF VISITING FORCES, *supra* note 47, at 93; LAZAREFF, *supra* note 42, at 126.

<sup>69</sup> NATO SOFA, *supra* note 5, art.VII, para. 2a.

<sup>70</sup> *Id.* art. VII, para. 2b.

DRAFT

the receiving and sending state have concurrent jurisdiction over the offense. The sending state has primary jurisdiction in two instances. The first instance involves those acts in which the property or security of the sending state is victimized or a member of the force or civilian component from the sending state is victimized.<sup>71</sup> This is known as *inter se* ("among themselves") jurisdiction.<sup>72</sup> The second instance of primary jurisdiction for the sending state are for offenses arising from acts or omissions done in the performance of official duty.<sup>73</sup> In all other cases, primary jurisdiction resides with the receiving state.<sup>74</sup> However, the SOFA directs the receiving state to give "sympathetic consideration" to the sending state's request for waiver of primary jurisdiction.<sup>75</sup> Current United States policy is to only waive primary jurisdiction after securing the express approval of the service secretary of the military department affected.<sup>76</sup>

Article VII also provides the minimum framework for procedures involving notification of offenses, custody of suspects, and investigations into offenses<sup>77</sup> as well as provisions concerning sentences of death and imprisonment.<sup>78</sup> Article VII also provides there will be no double jeopardy for offenses prosecuted in the receiving territory except for military justice

---

<sup>71</sup> *Id.* art. VII, para. 3a(i).

<sup>72</sup> OPERATIONAL LAW HANDBOOK, *supra* note 51, at 289.

<sup>73</sup> NATO SOFA, *supra* note 5, art. VII, para. 3a(ii).

<sup>74</sup> *Id.* art. VII, para. 3b.

<sup>75</sup> *Id.* art. VII, para. 3c.

<sup>76</sup> Paul Conderman, *Jurisdiction*, in THE HANDBOOK OF THE LAW OF VISITING FORCES, *supra* note 47, at 129.

<sup>77</sup> NATO SOFA, *supra* note 5, art.VII, paras. 5 and 6.

<sup>78</sup> *Id.* art.VII, para. 7.

DRAFT

prosecution of military offenses arising out of the conduct.<sup>79</sup> Article VII gives certain due process entitlements for members of the sending state prosecuted in the receiving state. These entitlements include the right to a prompt and speedy trial; to be informed of the specific charges in advance of trial; to have legal representation of the member's choice; can communication with a representative of the sending state.<sup>80</sup>

Finally, Article VII also authorizes the sending state to use regularly constituted forces to police the military establishments of the sending states.<sup>81</sup> Outside the establishment, such military police may only be employed subject to agreement with the receiving state and only for the purpose of maintaining discipline and order among the members of the sending state force.<sup>82</sup>

Article VII, while controversial at its inception, has succeeded.<sup>83</sup> The NATO sending and receiving states have worked out the contentious cases that have occasionally arisen. The likely reason is that both parties realized the importance of basing foreign troops in defense against the Soviet threat outweighed the individual controversies concerning jurisdiction.

*h. Article VIII: Claims*

---

<sup>79</sup> *Id.* art.VII, para. 8.

<sup>80</sup> *Id.* art. VII, para. 9.

<sup>81</sup> *Id.* art. VII, para. 10a.

<sup>82</sup> *Id.* art. VII, para. 10b.

<sup>83</sup> DRAPER, *supra* note 44, at 183.

DRAFT

Article VIII deals with three types of claims: Intergovernmental claims; third-party claims arising from acts or omissions done in the course of official duty; and third party claims arising from private wrongful acts or omissions done outside the course of official duty.<sup>84</sup>

The first type of claim, intergovernmental claims recognize the pragmatism of dealing with the fact that military operations are bound to result in some damage.<sup>85</sup> Thus, most intergovernmental claims are waived.<sup>86</sup>

Third-party claims arising from acts or omissions done in the course of official duty are divided into allowable and non-allowable claims. Allowable claims include those claims arising out of tortious acts of a member of the armed forces while on duty.<sup>87</sup> Non-allowable claims are contractual claims.<sup>88</sup> “The receiving state processes such [allowable] claims either administratively or judicially according to its own law and regulations.”<sup>89</sup> The sending and receiving states then allocate the costs of paying the claims arising from the acts or omissions of members of their forces done while in official duty.<sup>90</sup> Members of the force cannot be

---

<sup>84</sup> NATO SOFA, *supra* note 5, art. VIII. See also Jody M. Prescott, *Claims*, in THE HANDBOOK OF THE LAW OF VISITING FORCES, *supra* note 47, at 163.

<sup>85</sup> JODY M. PRESCOTT, *Claims*, in THE HANDBOOK OF THE LAW OF VISITING FORCES, *supra* note 47, at 163.

<sup>86</sup> NATO SOFA, *supra* note 5, art.VIII, paras. 1 and 4.

<sup>87</sup> *Id.* art. VIII, para. 5.

<sup>88</sup> *Id.*

<sup>89</sup> JODY M. PRESCOTT, *Claims*, in THE HANDBOOK OF THE LAW OF VISITING FORCES, *supra* note 47, at 164.

<sup>90</sup> NATO SOFA, *supra* note 5, art. VIII, para. 5e.

DRAFT

subject to any civil proceeding or enforcement of claim judgment in the receiving state in the matter arising from the performance of official duty.<sup>91</sup>

The final type of claim is that type described as *Ex Gratia*. These are the claims arising from the acts or omissions of members of the force committed while not in the performance of official duty. *Ex Gratia* claims are investigated and received by the receiving state.<sup>92</sup> The receiving state then prepares a report concerning the claim and delivers it to the sending state.<sup>93</sup> The sending state then determines whether to pay the claim and for what amount.<sup>94</sup> Any disputes regarding whether the tortious act or omission was done in the performance of official duty are submitted to arbitration.<sup>95</sup>

*i. Article IX: Goods and Services*

Article IX deals with the logistics of the force. The eight paragraphs of Article IX address different facets of the logistical support needed to employ the forces.

The first paragraph in Article IX provides that members of the sending state and their dependents may not be discriminated against in the personal purchase of local goods and

---

<sup>91</sup> *Id.* art. VIII, para. 5g.

<sup>92</sup> *Id.* art. VIII, para. 6a.

<sup>93</sup> *Id.* art. VIII, paras. 6a and 6b.

<sup>94</sup> *Id.* art. VIII, para. 6b.

<sup>95</sup> *Id.* art. VIII, para. 8.

DRAFT

services.<sup>96</sup> However, the Article goes on to state that in order to avoid adverse effect on the local economy, the receiving state may restrict the sending state's purchase of subsistence goods.<sup>97</sup> This provision has less importance than it did in a post World War II European economy.<sup>98</sup>

Article IX also provides that receiving state shall assist in supplying a local labor force.<sup>99</sup> The paragraph regarding labor was intended to prevent a sending state from "outbidding" the receiving state for the services of the local labor pool.<sup>100</sup>

The rest of Article IX deals with medical facilities; traveling facilities; and payment for goods and services.<sup>101</sup> These other paragraphs of Article IX have not generated any issues.

*j. Article X: Taxes*

As far as the United States is concerned, sovereigns do not tax other sovereigns. Thus, the sending state should not pay taxes on goods and services imported to or purchased in the receiving state for official use.<sup>102</sup> However, other nations apply "territorial principle to

---

<sup>96</sup> NATO SOFA, *supra* note 5, art. IX, para. 1.

<sup>97</sup> *Id.* art. IX, para. 2.

<sup>98</sup> LAZAREFF, *supra* note 42, at 367.

<sup>99</sup> NATO SOFA, *supra* note 5, art. IX, para. 4.

<sup>100</sup> LAZAREFF, *supra* note 42, at 373.

<sup>101</sup> NATO SOFA, *supra* note 5, art. IX, paras. 5, 6, 7, 8.

<sup>102</sup> U.S. DEP'T OF AIR FORCE, DIR. 51-7, INTERNATIONAL LAW para. 6 (19 JAN. 2001); *see also* OPERATIONAL LAW HANDBOOK, *supra* note 51, at 291.

DRAFT

taxation, with tax liability based primarily on the location of the activity within the state's borders.”<sup>103</sup> In these nations, only specific legal authority may exempt visiting military forces from taxes.<sup>104</sup> Article X of the SOFA reflects the United States view on taxation of sovereigns. Article X, paragraph 1 provides that the salary and entitlements of a member of the force or the civilian component will not be taxable by the receiving state.<sup>105</sup> Article X also provides that the receiving state will not impose taxes on any tangible movable personal property of a member of the sending state that is located in the receiving state solely due to the member’s temporary presence.<sup>106</sup> Additional exemptions concerning taxes may be found in supplementary agreements.<sup>107</sup> The commonly encountered difficulty comes through the confusion “in distinguishing taxes from other sources of governmental revenue such as customs duties and service charges, for which exemptions may be different or not available.”<sup>108</sup>

*k. Articles XI through XIV: Customs Generally*

As was done with the issue of taxes, the drafters of the NATO SOFA had to reconcile the divergent interests of two sovereign entities when it came to the thorny and important issue

---

<sup>103</sup> Mark D. Welton, *Tax Exemptions*, in HANDBOOK OF THE LAW OF VISITING FORCES, *supra* note 47, at 219.

<sup>104</sup> *Id.* at 220.

<sup>105</sup> NATO SOFA, *supra* note 5, art. X, para. 1.

<sup>106</sup> *Id.*

<sup>107</sup> Mark D. Welton, *Tax Exemptions*, in HANDBOOK OF THE LAW OF VISITING FORCES, *supra* note 47, at 222.

<sup>108</sup> *Id.* at 225.

DRAFT

of customs.<sup>109</sup> The general rule in the NATO SOFA is that “members of a force and of a civilian component as well as their dependents shall be subject to the laws and regulations administered by the customs authorities of the receiving State.”<sup>110</sup> Article XI goes on to carve out the exemptions to this general rule. For example, there is the duty-free import of service vehicles of the force,<sup>111</sup> private motor vehicles of members of the force and civilian component,<sup>112</sup> and official documents under seal.<sup>113</sup>

Article XII of the NATO SOFA basically restates the paragraph 1 of Article XI.<sup>114</sup> These two paragraphs give the receiving state the right to inspect for customs purposes as well as the right to enforce applicable customs procedures.<sup>115</sup> Article XIII elaborates on Article XII by detailing the assistance given to customs and fiscal authorities.<sup>116</sup> Article XIII foresaw the need for “cooperation between the authorities of the sending and of receiving state for the conduct of inquiries and the collection of evidence.”<sup>117</sup> The final paragraph of Article XIII

---

<sup>109</sup> *Id.* at 231.

<sup>110</sup> NATO SOFA, *supra* note 5, art. XI, para. 1.

<sup>111</sup> *Id.* art. XI, para. 2.

<sup>112</sup> *Id.* art. XI, para. 6.

<sup>113</sup> *Id.* para. 3.

<sup>114</sup> LAZAREFF, *supra* note 42, at 412.

<sup>115</sup> *Id.* at 401, 412.

<sup>116</sup> *Id.* at 412.

<sup>117</sup> *Id.*

## DRAFT

was intended to prevent the sending state from being victimized by the acts of its members who use the sending state's vehicles or other articles in committing the offense.<sup>118</sup>

Article XIV simply provides that members of the sending and receiving states are subject to the foreign exchange rates of each state.<sup>119</sup>

### *l. Article XVI: Settlement of Disputes*

Since the inception of the NATO SOFA, commentators have disagreed whether Article XVI prohibits referral of disputes to the United Nations International Court of Justice. Serge Lazareff noted that only nations of the world have access to the International Court of Justice, not international organizations.<sup>120</sup> Lazareff suggested that the best practical solution was for the parties involved to agree upon an arbitration procedure.<sup>121</sup> Otherwise, the only forum to solve disputes is the North Atlantic Council.<sup>122</sup>

While there has been debate about the forum of disputes, the point has been a moot one since no member countries have taken their disputes to any form of arbitration. This is most

---

<sup>118</sup> *Id.*

<sup>119</sup> NATO SOFA, *supra* note 5, art. XIV.

<sup>120</sup> LAZAREFF, *supra* note 42, at 422.

<sup>121</sup> *Id.*

<sup>122</sup> NATO SOFA, *supra* note 5, art. XVI. *See also* Baldwin de Vidts, *Settlement of Disputes in HANDBOOK OF THE LAW OF VISITING FORCES*, *supra* note 47, at 238-40 (author examines but rejects alternative theories in which a NATO member state could unilaterally invoke the jurisdiction of the International Court of Justice).

DRAFT

likely due to the success of bilateral negotiations of any disputes between member countries.<sup>123</sup>

*3. Annexes or Supplementary Agreements*

Even a casual reading of the NATO SOFA leaves one with the firm impression that there needed to be more spelled out as to terms. The United States has completed numerous supplemental agreements to the NATO SOFA with other NATO partners.<sup>124</sup> Some of the agreements, such as the supplementary agreement with Germany, are detailed.<sup>125</sup> These supplementary agreements are the lifeblood of the NATO SOFA as the member nations cooperate, or at least try to cooperate, on a daily basis to ensure the spirit and intent of the NATO SOFA is followed. As Lazareff stated:

[T]he gravest error one could commit would be to consider [the] SOFA as a self-sufficient text. In fact, this Treaty, as most treaties can only be judged through its practical and daily application and to that extent the Preamble authorizing the conclusion of separate agreements is of the utmost importance. The value of SOFA is largely due to its practical application....The principles appearing in the Agreement allow, with good will, the settlement of all problems; in that regard, one must insist upon the importance of the personal contacts between the authorities of the sending State and the appropriate authorities of the receiving State.<sup>126</sup>

---

<sup>123</sup> de Vidts, at 237.

<sup>124</sup> The Center for Law and Military Operations (CLAMO) maintains a list of SOFAs with texts, at <http://www.jagcnet.army.mil>.

<sup>125</sup> German SOFA, *supra* note 48.

<sup>126</sup> LAZAREFF, *supra* note 42, at 445.

## DRAFT

Thus, the supplementary agreements often provide the important details regarding the basing of forces.

### *4. Significance of the NATO SOFA*

The NATO SOFA was a historic agreement. Never before had the rights of a based military force in the host country been spelled out. The tension of having such a force, even in a friendly host country, was tremendous. Yet, the NATO SOFA has given stability and structure to the relations and activities of both sending and receiving states in NATO. Among international treaties, the NATO SOFA is a success. The SOFA helped NATO become a powerful international organization.

## IV. The European Union

For most of the latter half 20<sup>th</sup> century, NATO was the pre-eminent intergovernmental organization in Europe. However, the European Union quickly grew during the 1980s and 1990s to be an organization on par or superior in significance to NATO. The roots of the European Union are similar to NATO. While there had been some abstract discussion of a unified Europe before World War II, the serious move toward combining the strengths of the European countries started in earnest after World War II.

### A. History

## DRAFT

The history of the EU is an interesting reflection of European history in the 20<sup>th</sup> Century. The EU is a complicated supranational organization. There is an ever-increasing amount of literature attempting to explain the complicated structure and activities of the EU. Like the above section on NATO, this article's overview of the EU is designed simply to give the reader a good idea of how the EU got to where it is today.

### *1. Origins of the European Union*

One of the first proponents of a Europe united in some form was Jean Monnet of France. Monnet is commonly referred to as the founding father of European integration.<sup>127</sup> He and other European statesmen such as Robert Schuman and Winston Churchill firmly believed that a new approach was needed to prevent another World War devastating Europe.<sup>128</sup> Monnet believed the best solution was that of a supranational government.<sup>129</sup> "A supranational entity has the power to make decisions that are binding on member states and citizens in those member states even if those member states disagree."<sup>130</sup> The first step in this form of supranationalism was the European Coal and Steel Community (ECSC). The founding member nations of this organization were Belgium, France, West Germany, Italy, Luxembourg, and the Netherlands.<sup>131</sup> The ECSC was designed to pool together the coal and

---

<sup>127</sup> TAYLOR, *supra* note 2, at 14.

<sup>128</sup> ALEX RONEY & STANLEY BUDD, THE EUROPEAN UNION: A GUIDE THROUGH THE EC/EU MAZE 2 (6<sup>th</sup> ed. 1998).

<sup>129</sup> GEORGE, *supra* note 3, at 129.

<sup>130</sup> *Id.* at n 4.

<sup>131</sup> *Id.* at 129.

DRAFT

steel resources of the member nations for economic benefit. More importantly, the member countries saw a binding of resources as the best way to prevent another outbreak of war in Western Europe.<sup>132</sup> The ECSC was successful on both accounts.<sup>133</sup> This success led Jean Monnet and others to believe that further unity was possible.

## 2. *The Treaty of Rome*

The first step in greater unity for Europe was the Treaty of Rome<sup>134</sup> which became effective in 1958. This treaty is still the fundamental document of the EU.<sup>135</sup> The Treaty established the concept of a common market and created the European Economic Community (EEC).<sup>136</sup> The objectives of the EEC were set out in the Treaty of Rome:

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in this Treaty, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.<sup>137</sup>

---

<sup>132</sup> RONEY & BUDD, *supra* note 128, at 2.

<sup>133</sup> *Id.*

<sup>134</sup> European Community Treaty, March 1957, 298 U.N.T.S 267 [hereinafter Treaty of Rome].

<sup>135</sup> GEORGE, *supra* note 3, at 130.

<sup>136</sup> *Id.*, at 129.

<sup>137</sup> Treaty of Rome, *supra* note 134, art. II.

## DRAFT

The future of Europe at that time appeared to be evolving rapidly. “On the same day the Treaty of Rome creating the EEC was signed, a second Treaty of Rome creating the European Atomic Energy Community (EURATOM) was also signed by the same six nations. EURATOM’s purpose was to integrate the fledgling atomic energy industries of the six nations.”<sup>138</sup> It was hoped that these European Communities would elevate the economic and political power of Western Europe.

### *3. The Single European Act*

Through the latter 1960s, 1970s and early 1980s, the European Communities had not reached their potential their founders envisioned. “At the same time Europe’s power in the international system was declining . . . Europe fell behind the United States and Japan. As a consequence of the relations between the superpowers, some observers called Europe the chessboard over which the American and Soviet masters made their strategic moves.”<sup>139</sup> In 1985, the Member States began to debate the changes needed to strengthen the European Communities. In 1986, the Member States agreed to the Single European Act.<sup>140</sup> This Act began the true economic union of the Member States effective 31 December 1992. This was an important step for the Member States as it “resulted in over 370 million consumers being able to trade freely without different technical and regulatory standards, border controls, and

---

<sup>138</sup> GEORGE, *supra* note 3 at 132.

<sup>139</sup> *Id.* at 133.

<sup>140</sup> Single European Act, Feb. 28, 1986, B.T.S. 31 (1988) (United Kingdom), 25 I.L.M. 503.

DRAFT

excise taxes.”<sup>141</sup> By this time, the European Community Member States had grown to 12, with the United Kingdom, Ireland, Denmark, Spain, Portugal, and Greece joining the European Community.<sup>142</sup>

#### 4. *Maastricht Treaty*

While the Single European Act was a great step forward in European Unity, much more remained to be done. Out of the desire for greater economic union and even political union, the Treaty of the European Union, commonly referred to as the Maastricht Treaty, was drafted.<sup>143</sup> The Maastricht Treaty accomplished numerous changes. The first change was that for the first time the name European Union was used.<sup>144</sup> It also created the concept of the Three Pillars. The symbol of the Three Pillars described the changes that one commentator has described as:

The image was of a temple with three pillars, the roof being the common institutional framework, and the three pillars being the economic community, the foreign and defence arrangements, now incorporated in a Common Foreign and Security Policy (CFSP), and a citizen’s Europe . . . which involved more police cooperation, more common consular representation, and a move towards a common visa policy.<sup>145</sup>

---

<sup>141</sup> *Id.* at 134.

<sup>142</sup> ROWNEY & BUDD, *supra* note 128, at 7.

<sup>143</sup> TAYLOR, *supra* note 2, at 53-54.

<sup>144</sup> GEORGE, *supra* note 3, at 134.

<sup>145</sup> TAYLOR, *supra* note 2, at 54.

## DRAFT

Under this Three Pillar structure, the Maastricht Treaty covered a broad range of social, economic, and education issues.<sup>146</sup> The most visible aspect of the Maastricht Treaty was the economic aspect. This aspect is referred to as the Economic Monetary Union (EMU). “The agreement on EMU at Maastricht set the structure, goals and timetable for achieving a high degree of economic convergence between Member States, and the creation of a single currency, the Euro.”<sup>147</sup> The Maastricht Treaty came into effect on 1 November 1993.<sup>148</sup> Two years later, Austria, Finland, and Sweden joined the EU, bringing the EU to its current total membership.

### 5. *Amsterdam Treaty*

The Treaty of Amsterdam<sup>149</sup> is the result of the Intergovernmental Conference launched at the Turin European Council on 29 March 1996.<sup>150</sup> It came into effect on 1 May 1999 after ratification by all the Member States in accordance with their respective constitutional requirements.<sup>151</sup> The Treaty of Amsterdam expanded on the Three Pillars of the Maastricht Treaty. It emphasized the need for Member states to work together in their economic

---

<sup>146</sup> See RONEY & BUDD, *supra* note 128, at 31-35.

<sup>147</sup> *Id.* at 33.

<sup>148</sup> Treaty on European Union, Feb. 7, 1992, B.T.S. 12 (1994), (United Kingdom), 31 I.L.M. 247.

<sup>149</sup> Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing The European Communities And Certain Related Acts, Oct. 2, 1997, O.J (C 340) (1997), 37 I.L.M. 56.

<sup>150</sup> Europa, *Treaty of Amsterdam*, at <http://europe.eu.int/scadplus/leg/en/s50000.htm> (last visited Mar. 18, 2002).

<sup>151</sup> *Id.*

DRAFT

policies.<sup>152</sup> It also extended the powers of the European Parliament (discussed more fully below) especially in the area of integrating telecommunications, transport, energy, and employment policy.<sup>153</sup> The Treaty of Amsterdam also consolidated many of the previous European Union treaties.<sup>154</sup>

The Treaty of Amsterdam also incorporated the Schengen Agreement regarding border controls. The Schengen Agreement was signed on 14 June 1985.<sup>155</sup> The signatories, Belgium, France, Germany, Luxembourg and the Netherlands, agreed they would remove their common border controls and introduce freedom of movement for all nationals of the signatory Member States, other Member States or third countries.<sup>156</sup> The technical details of the Schengen Agreement were handled by the Schengen Convention.<sup>157</sup> This Convention was signed by the original five parties on 19 June 1990. It set out the arrangements and guarantees for implementing freedom of movement. It amended the relevant national laws and is subject to parliamentary ratification. Italy, Spain, Portugal, Greece, Austria, Sweden, Finland, Denmark, Iceland, and Norway also joined the list of signatories. Both the

---

<sup>152</sup> RONEY & BUDD, *supra* note 142, at 35.

<sup>153</sup> *Id.*

<sup>154</sup> Unfortunately, this consolidation is sometimes more confusing than enlightening. This confusion is most apparent when researching articles and European Court of Justice cases dated before the Treaty of Amsterdam. Article numbers of treaties changed when the treaties were consolidated. Most practitioners and scholars now cite to the consolidated versions of the European Union and European Community treaties. See Consolidated Version of the Treaty on European Union and Consolidated Version of the Treaty Establishing the European Community [hereinafter EU TREATY & EC TREATY], available at the official European Website, <http://europa.eu.int/eur-lex/en/treaties/index.html> (last visited Mar. 9, 2002).

<sup>155</sup> Schengen Agreement, Jun. 14, 1985, 30 I.L.M. 68.

<sup>156</sup> PHILLIP THODY, A HISTORICAL INTRODUCTION TO THE EUROPEAN UNION 57 (1997).

<sup>157</sup> Schengen Convention, Jun. 19, 1990, 30 I.L.M. 84.

## DRAFT

Schengen Agreement and the resulting Convention, were further implemented by the declarations and decisions adopted by intergovernmental body known as the the Schengen Executive Committee. The Agreement, the Convention, and the decisions and declarations of the Executive Committee make up what is known as the Schengen *Acquis*.<sup>158</sup> The Treaty of Amsterdam incorporates this *acquis* into the European Union from 1 May 1999 onwards, since it relates to one of the main objectives of the single market, i.e. the free movement of persons.<sup>159</sup> Through the Treaty of Amsterdam, the EU Council took over the Schengen Executive Committee.<sup>160</sup>

The Treaty of Amsterdam was a significant step forward for the EU. A great amount of time and work went into reaching the Treaty and then securing its ratification. However, the EU would not take a respite after the Treaty of Amsterdam. EU officials went to work on the expansion of the EU into Eastern Europe, and expanding the role of the EU Parliament. The Treaty of Nice was the result of this work.

### 6. *The Treaty of Nice and Beyond*

According to the European Union, The Treaty of Nice<sup>161</sup> was primarily designed to prepare the way for enlargement of the European Union from its present size of 15 countries

---

<sup>158</sup> EUROPEAN UNION, *The Amsterdam Treaty: A Comprehensive Guide*, at <http://europa.eu.int/scadplus/leg/en/lvb/a09000.htm> (last visited Mar. 18, 2002)

<sup>159</sup> Phillip Manin, *The Treaty of Amsterdam*, 4 COLUM. J. EUR. L. 1, 7 (1998)

<sup>160</sup> OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, THE SCHENGEN AQUIS: INTEGRATED INTO THE EUROPEAN UNION 20 (2001).

<sup>161</sup> Treaty of Nice, Dec. 12, 2000, O.J. (C 80) (2001), 40 I.L.M. 266 [hereinafter Treaty of Nice].

DRAFT

to 27 countries.<sup>162</sup> The Treaty of Nice was signed on February 26, 2001.<sup>163</sup> It has yet to be ratified.

In addition to the matters on the Treaty of Nice, the EU has started the process to establish an even more open government, giving more voice at the European level for national parliaments, and, last but not least, a European constitution.<sup>164</sup>

## B. Member States of the European Union

While a Union of nations, not all of the EU countries are in lockstep in all facets of the Union. For example, the United Kingdom has opted out of the Euro.<sup>165</sup> There is an ongoing debate whether the EU is truly a supranational organization or simply a “Megaphone for leading states” of the Union.<sup>166</sup> This debate is likely to continue for some time. The 15 member states, while sharing a common European heritage, are vastly divergent. The UK is a world apart from Italy and Italy has little in common with Luxembourg. However, the introduction of the Euro appears to be a significant step in the direction of a commonality across Europe.

---

<sup>162</sup> EUROPEAN COMMISSION, WHAT DIFFERENCE WILL THE TREATY OF NICE MAKE? (2001), available at [http://europa.eu.int/comm/igc2000/dialogue/info/offdoc/guidecitoyen\\_en.pdf](http://europa.eu.int/comm/igc2000/dialogue/info/offdoc/guidecitoyen_en.pdf). For list of member countries and potential enlargement countries, see *supra* note 4.

<sup>163</sup> Treaty of Nice, *supra* note 161.

<sup>164</sup> Kirsty Hughes, *Outcomes of the Laeken Summit: A Comment Piece*, (December 2001), The Centre for European Policy Studies Website, at <http://www.ceps.be/Commentary/Dec01/Laeken.htm>.

<sup>165</sup> See Euro Essentials, *supra* note 1.

<sup>166</sup> Jeremy Rabkin, *Is E.U. Policy Eroding the Sovereignty of Non-Member States?*, 1 CHI. J. INT'L L. 273, 274 (2000).

DRAFT

## C. Organization & Administration of the European Union

According to Stuart Eizenstat, former Ambassador to the US Mission to the European Union, “The EU is unique; not a regional organization like the UN. It is also not a customs union, or a trade organization like GATT, nor is it a nation-state.”<sup>167</sup> Supporting this unique organization, is a large bureaucracy dedicated to lengthy deliberation of issues.<sup>168</sup>

### *1. European Commission*

The EU Commission is generally regarded as the EU Executive branch. It consists of 20 members from the different member states.<sup>169</sup> One author has divided the powers of the EU Commission into five categories: Guardian of the EU Treaty; participation in the legislative process; advisory capacity; representative capacity; financial management; and administrative tasks.<sup>170</sup> As guardian of the treaty, the EU Commission has the power to compel member states to follow the Treaty of European Union. If necessary, the EU Commission can take the offending state to the European Court of Justice.<sup>171</sup> The EU Commission participates in the legislative process by initiating and assisting with

---

<sup>167</sup> Stuart Eizenstat, *United States Relations with the European Union and the Changing Europe*, 9 EMORY INT'L L. REV. 1, 2-3 (1995).

<sup>168</sup> RONEY & BUDD, *supra* note 128, at 40-41.

<sup>169</sup> WALTER CAIRNS, INTRODUCTION TO EUROPEAN UNION LAW 20 (1997).

<sup>170</sup> *Id.* at 23-26.

<sup>171</sup> *Id.* at 23.

## DRAFT

legislation.<sup>172</sup> The EU Commission can even directly legislate certain matters, such as employment regulations.<sup>173</sup> The EU Commission performs its advisory role by issuing recommendations and opinions on policy areas.”<sup>174</sup> In performing in a representative capacity, the EU Commission acts on behalf of the EU when the EU engages in legally binding matters.<sup>175</sup> In regards to financial management, the EU Commission advises on the budget and is responsible for implementing the budget.<sup>176</sup> Finally, the EU Commission performs numerous administrative tasks to support its roles.<sup>177</sup>

### *2. European Council*

The Council of Ministers is considered the decision-maker of the EU.<sup>178</sup> A great deal of confusion arises from the fact there also exists a Council of Europe as well as the European Council. The Council of Europe is an organization completely separate from the EU. It was founded in 1919 to achieve cooperation in the cultural, social, political, legal, and social fields.<sup>179</sup> The European Council refers to the annual summits of the Heads of EU member

---

<sup>172</sup> *Id.* at 24.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 25.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> RONEY & BUDD, *supra* note 128, at 12.

<sup>179</sup> CAIRNS, *supra* note 169, at 12.

## DRAFT

states.<sup>180</sup> The Council of Ministers, by contrast, is composed of a representative from each member state at ministerial level.<sup>181</sup> These representatives are authorized to commit the member state.<sup>182</sup>

The President of the Council of Ministers is as close as the EU comes to having a head of state. “The presidency of the council rotates among the Member States at six month intervals, commencing in January and July. The function of the President is to call meetings, to preside at them and to chair the meeting.”<sup>183</sup> The President also sets the agenda for his or her six-month term.<sup>184</sup>

### *3. European Parliament*

The main beneficiary of the Treaty of Amsterdam was the EU Parliament.<sup>185</sup> Prior to the Treaty of Amsterdam, the Parliament acted only as a consultative body. The Treaty of Amsterdam gave the Parliament increased legislative powers.<sup>186</sup> The EU Parliament allocates its seats by proportionality and national sensitivity.<sup>187</sup> As of 7 February 2002, there

---

<sup>180</sup> RONEY & BUDD, *supra* note 128, at 13.

<sup>181</sup> CAIRNS, *supra* note 169, at 12.

<sup>182</sup> *Id.*

<sup>183</sup> JAMES HANLON, EUROPEAN COMMUNITY LAW 31 (2000).

<sup>184</sup> *Id.*

<sup>185</sup> THE TREATY OF AMSTERDAM: TEXT AND COMMENTARY, XXXXV, (Andrew Duff ed., 1997).

<sup>186</sup> *Id.* at 143.

<sup>187</sup> CAIRNS, *supra* note 169, at 30.

DRAFT

were 626 members of the EU Parliament.<sup>188</sup> The composition is confusing to any outsider.

There are seven political parties ranging from the Group of the European People's Party and the Group of the Party of European Socialists to Group for a Europe of Democracies and Diversities.<sup>189</sup> Additionally, there are those members who have no affiliation.<sup>190</sup>

The EU Parliament has the following legislative powers and functions: right to information; right to consultation; cooperation procedure; formulation of legislation; and approval of certain types of legislation.<sup>191</sup> These powers and functions reflect different levels of involvement in the EU governing process. An example of the EU Parliament's right to information is the requirement for the EU Council to inform Parliament when the EU Council decides to allow member states to take unilateral measures against third countries with regard to capital movements.<sup>192</sup> The EU Parliament also has a discretionary and obligatory right to consult on legislation. The obligatory right to consult is found in certain cases such as the common organization of agricultural markets.<sup>193</sup> In obligatory cases, if the EU Parliament has not been consulted, then the legislation is voidable.<sup>194</sup> The co-operation procedure is the right of the EU Parliament to reject the common position adopted by the EU

---

<sup>188</sup> EU Parliament, *Members of the Parliament*, available at <http://www.europarl.eu.int> (last visited March 9, 2002).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> CAIRNS, *supra* note 169, at 32-33.

<sup>192</sup> *Id.* at 31-32.

<sup>193</sup> *Id.* at 32.

<sup>194</sup> *Id.*

## DRAFT

Council.<sup>195</sup> The EU Parliament can also formulate legislation by the co-decision procedure that is basically a multi-stage process of adoption or vetoes.<sup>196</sup> The final legislative power of the EU Parliament is the requirement of assent. The EU Parliament must assent to certain legislation such as ratification of international agreements.<sup>197</sup>

The EU Parliament also has budgetary and political powers. In regards to budgetary powers, the “Parliament has been given the last word on non-compulsory expenditure.”<sup>198</sup> For the political function, the EU Parliament debates on general areas of policy and topical issues that may result in the adoption of resolutions.<sup>199</sup>

Finally, the EU Parliament has what has been described as “supervisory powers.”<sup>200</sup> The EU Parliament has the right to censure the EU Commission and even the right to resign.<sup>201</sup> The EU Parliament can establish a temporary committee to investigate irregularities in the administration of the EU.<sup>202</sup>

### *4. European Court of Justice*

---

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 32, 54.

<sup>197</sup> *Id.* at 32.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 33.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

DRAFT

The European Court of Justice has been an influential body in the EU. As one commentator has noted

[I]ts activities have had a profound effect upon the development of Community law, particularly with regard to the foundation of a “constitution” of the Community. There is little doubt that the Court of Justice saw the Treaties as expressions of purpose, and further saw their role as adding substance to those “dry bones.” The Court has been concerned to ensure that Community law is effective, both in respect of a new legal system in its own right, and in terms of integration with the legal systems of the Member States. It could, and has, been argued that the Court has gone far beyond what was intended by the Treaty; never the less, the Court has developed a package of fundamental rights which have become an entrenched part of the Community system.<sup>203</sup>

The Court of Justice has two bodies: The Court of Justice itself and the Court of First Instance.<sup>204</sup> The Court of Justice is composed of 15 judges. The practice has been for each nationality of the member states to be represented.<sup>205</sup> The judges of the Court of Justice are assisted by eight Advocates General. The position of Advocate General is an aspect of the Civil Law system. In fact, the position is modeled after the Commissair du Gouvernement found in the French legal system.<sup>206</sup> In criminal cases, the Advocate General acts as a public prosecutor who brings the case against the accused on behalf of the public interest. In civil cases, the Advocate General acts as an expert advisor who gives a viewpoint representing the

---

<sup>203</sup> HANLON, *supra* note 183, at 39.

<sup>204</sup> CAIRNS, *supra* note 169, at 34.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 34-35.

DRAFT

public interest.<sup>207</sup> Frequently, the Court of Justice will follow the recommendation of the Advocate General.<sup>208</sup>

The Court of First Instance has the same number of judges as the Court of Justice.<sup>209</sup> The main purpose of the Court of First Instance is to relieve the workload of the Court of Justice by taking on the more routine cases.<sup>210</sup> The Court of First Instance deals with disputes between EU organizations. It also hears competition cases, ECSC disputes, as well as intellectual property cases among other cases.<sup>211</sup> Decisions of the Court of First Instance are appealable to the Court of Justice, but only on issues of law.<sup>212</sup>

### *5. Other European Union Organizations*

While not as high profile as those EU organizations discussed above, other organizations within the EU play a significant role in the administration of the EU. These organizations include the European Court of Auditors, the European Investment Bank, the European Economic and Social Committee, and the Committee of Regions. The European Court of Auditors consists of 15 members. “Court” is a misnomer, as it does not decide on any matters. It is a specialist body established by the EU in 1977 to monitor and supervise the

---

<sup>207</sup> *Id.* at 34.

<sup>208</sup> *Id.* at 35.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

DRAFT

finances of the EU.<sup>213</sup> Another financial body of the EU is the European Investment Bank. It is the investment arm of the EU.<sup>214</sup> Created by the Single European Act, it provides the EU a way of developing actions leading to economic and social cohesion.<sup>215</sup> The European Investment Bank makes loans and guarantees for development of less-developed regions; modernization; business development of projects of common interest.<sup>216</sup>

The European Economic and Social Committee (ESC) represents the major social and economic groups in society such as trade unions and management organizations.<sup>217</sup> As of 2000, the ESC had 198 members.<sup>218</sup> The membership is by a formula prescribed by the European Community Treaty.<sup>219</sup> The ESC must be consulted on certain matters. These matters include common agricultural policy, free movement of workers, and common transport policy.<sup>220</sup> The ESC may be consulted on matters other than economic and social policy if deemed necessary by other EU organizations.<sup>221</sup>

---

<sup>213</sup> *Id.* at 42.

<sup>214</sup> HANLON, *supra* note 183, at 8.

<sup>215</sup> *Id.*

<sup>216</sup> CAIRNS, *supra* note 169, at 43.

<sup>217</sup> *Id.* at 40.

<sup>218</sup> THE ESC: A BRIDGE BETWEEN EUROPE AND CIVIL SOCIETY 10 (2000) available at [http://www.esc.eu.int/pages/en/org/pla\\_EN.pdf](http://www.esc.eu.int/pages/en/org/pla_EN.pdf).

<sup>219</sup> EC TREATY, *supra* note 154, art. 194, para. 1.

<sup>220</sup> CAIRNS, *supra* note 169, at 40.

<sup>221</sup> *Id.*

## DRAFT

The Committee of the Regions is similar to the ESC in that it is a consultive body. The Committee of the Regions was created by the Treaty of Maastricht to give the local and regional governing bodies of the EU Member states a voice in the EU organization.<sup>222</sup> The Committee of the Regions must be consulted on issues such as education, vocational training, youth, culture, public health, trans-European Networks, and economic social cohesion.<sup>223</sup>

It is plainly evident that there are numerous EU organizations. The large number of organizations leads to an extraordinary output of regulations. The law that binds all these diverse organizations is no less complicated.

### D. European Union Law

The first important point about the EU law is the terminology. Technically, the European Union is a only political entity. The law actually comes from the European Communities pillar of the EU. This distinction has led to confusion. Some observers refer to EU law and others refer to EC law. This article uses the term “EU law”.

Perhaps the easiest way to briefly describe EU law is to describe what it is not. EU law is not the rules governing the institutions of other European Organizations such as the European

---

<sup>222</sup> HANLON, *supra* note 183, at 38.

<sup>223</sup> *Id.* at 39.

DRAFT

Convention of Human Rights.<sup>224</sup> Additionally, EU law does not include the national laws that incorporate the community law.<sup>225</sup>

The question remains, what is EU law? While a complete analysis and description of EU law is beyond the scope of this article, there are some basic principles of EU law that need to be briefly described. “Three principles were at the heart of the Community’s legal system, namely direct applicability, direct effect and the principle that European law had primacy over national law.”<sup>226</sup>

The first of the three principles, Direct Applicability, has been described as follows, “Direct applicability was the principle that regulations approved by the Council of Ministers would be applicable within member states without further enactment by national authorities.”<sup>227</sup> One commentator has called the regulations made effective through Direct Applicability one of the “most powerful law-making tools available to the Community.”<sup>228</sup>

Direct Effect is a unique aspect that differentiates the EU from the United Nations, World Trade Organization, and the Organization for Economic Co-operation and Development in that it provides individual citizens of member states substantive rights.<sup>229</sup> Direct Effect is

---

<sup>224</sup> CAIRNS, *supra* note 169, at 1.

<sup>225</sup> *Id.*

<sup>226</sup> TAYLOR, *supra* note 2, at 32.

<sup>227</sup> *Id.*

<sup>228</sup> HANLON, *supra* note 183, at 84.

<sup>229</sup> CAIRNS, *supra* note 169, at 83-84.

DRAFT

defined as “[T]he mechanism enabling the citizen to rely upon a provision of community law before his or her national courts, which are required to acknowledge, protect, and enforce the rights conferred by that provision.”<sup>230</sup> There are several conditions required before Direct Effect is recognized. First, the EU rule or law must be clear.<sup>231</sup> Second, the rule or law must be unconditional.<sup>232</sup> Finally, there may not be any reservation making its implementation dependent on further action taken by authorities.<sup>233</sup> Direct effect even means that the individual could sue another, be sued, or even sue their own government.<sup>234</sup>

The supremacy of EU law is the last key principle of the EU legal system. Basically, “[i]n the event of a conflict between community law and domestic law, it is the former which will prevail.”<sup>235</sup> Under Article 10 of the Consolidated EC Treaty, member states must take “all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. . . . They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.”<sup>236</sup> To some, there is no doubt that the EU countries have

---

<sup>230</sup> *Id.* at 84 (citing Case 26/62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration Van Gend En Loos, 1963 ECJ CELEX 609 (1963)).

<sup>231</sup> CAIRNS, *supra* note 169, at 85.

<sup>232</sup> *Id.* at 85-86.

<sup>233</sup> *Id.*

<sup>234</sup> TAYLOR, *supra* note 2, at 18.

<sup>235</sup> CAIRNS, *supra* note 169, at 8-9.

<sup>236</sup> EC TREATY, *supra* note 154, at art. 10.

DRAFT

transferred most, if not all, of national sovereignty over to the EU.<sup>237</sup> This is sometime referred to as the concept of Primacy.<sup>238</sup>

The terminology of the EU legislation can be confusing. The Consolidated European Community Treaty describes the four forms of EU legislation: Regulations, Directives, Decisions, and Recommendations/Opinions.<sup>239</sup> Regulations are laws adopted by the Council of the European Union upon a proposal from the Commission.<sup>240</sup> Regulations directly apply to all Member States.<sup>241</sup> Directives are EU laws adopted by the Council of the European Union upon a proposal from the Commission.<sup>242</sup> Directives are only binding as to the end result. The Member State is free to use any national form of implementation, such as regulations, decrees or statutes, to implement the Directive.<sup>243</sup> Decisions are EU laws, issued by the Council or Commission, which are binding on only those addressed, whether

---

<sup>237</sup> HANLON, *supra* note 183, at 53. See also KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE 183 (2001).

<sup>238</sup> Eizenstat, *supra* note 167, at 6-7.

<sup>239</sup> EC TREATY, *supra* note 154, art 249. See also DAVID MEDURST, A BRIEF AND PRACTICAL GUIDE TO EU LAW 31 (2001) [hereinafter MEDHURST].

<sup>240</sup> EC TREATY, *supra* note 154, art. 249.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

DRAFT

governments, companies or individuals.<sup>244</sup> Finally, EU Recommendations and Opinions have no binding force.<sup>245</sup>

The confusion arises in part due to the European Coal and Steel Community Treaty also using the terms Decisions and Recommendations.<sup>246</sup> These terms under that Treaty take on a different meaning. Additionally, some confuse the meaning of Directives with Regulations. They wrongly cite a Directive as dictating a certain process.<sup>247</sup> It is important to remember that the Directive only dictates an end result. The details of how one gets there are not considered in determining whether a violation of EU law has occurred.

Compared to the common law and civil law systems of its member states, the EU law is a very recent phenomenon. Whether this law can succeed in bringing order to the EU in the future has yet to be seen. One point is clear though, the EU law is distinct from the common and civil law. Any legal practitioner in Europe must become familiar with EU law. Additionally, due to the constant changes as the EU continues to evolve, the practitioner must stay current in order to give his client the best advice.

#### E. EU Future

---

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> MEDHURST, *supra* note 239, at 32.

<sup>247</sup> Telephone Interview with Lt Col Albert Klein, United States Military Delegation to the NATO Military Committee (Mar. 20, 2002).

DRAFT

The main issue facing the EU today is that of enlargement. Candidate countries are Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, and Slovenia.<sup>248</sup> According to the EU:

Over almost half a century, the European Union has helped put an end to the conflicts of the past and to strengthening peace, security, justice and well being throughout Europe. Since the invitation to the candidate countries to become part of the European Union, the enlargement process has contributed decisively to achieving political stability, economic progress and social justice. Stable institutions, changes of government on the basis of free and democratic elections, reinforced protection of human rights, including rights of minorities, and market economy principles are now common features. The enlargement process makes Europe a safer place for its citizens and contributes to conflict prevention and control in the wider world.

Enlargement will benefit not only existing and new Member States but also neighbouring countries, with which the European Union has close ties. No new dividing lines will be drawn across our continent. Each new Member State will bring to the EU its own political, economic, cultural, historical and geographical heritage, thus enriching Europe as a whole.<sup>249</sup>

Obviously the optimism of enlargement is tempered by the reality of almost doubling the size of the EU. EU organizations, already criticized as bloated bureaucracies and with a decision-making process that is snail-like,<sup>250</sup> will have to expand to meet the new demands placed on them by expansion. “The enlargement of the EU remains difficult without a

---

<sup>248</sup> See Europa, *supra* note 4 (providing a list of countries).

<sup>249</sup> EUROPEAN COMMISSION, EUROPEAN COMMISSION STRATEGY PAPER 4 (2001) available at [http://europa.eu.int/comm/enlargement/report\\_2001/](http://europa.eu.int/comm/enlargement/report_2001/).

<sup>250</sup> RONEY & BUDD, *supra* note 128, at 40-41.

DRAFT

credible reform of its institutions lest these institutions be unable to function after enlargement has begun.”<sup>251</sup>

Another important issue for EU is the development of a true foreign policy and a defense force to support that foreign policy. There has been a move for some time in the EU toward a more unified EU foreign policy vice collective action of member states.<sup>252</sup> As one of the Three Pillars of the EU, Common Foreign Security Policy (CFSP) has lagged behind the monetary unity implementations of the EU. The conflict in Kosovo highlighted the failure of the EU to enforce any foreign policy initiatives.<sup>253</sup> The challenge facing the EU in developing an enforceable foreign policy is a significant one. Failure to meet the challenge will prevent the EU from being as influential on the world stage as NATO was during the Cold War.

The transition to the new EURO currency has gone well so far. It is still too early to judge the new currency a complete success, especially since the UK has yet to participate, yet if the EURO is a success, then the EU will advanced it agenda greatly. The EU common markets and a common currency will fuel a powerful economic force. However, the true test of a world power, whether it is a traditional nation or a new concept such as the EU, is the ability to influence other nations in furtherance of its policy. So far the EU has not been able

---

<sup>251</sup> *The U.S. – European Relationship: Opportunities and Challenges*, Hearing before the House Subcommittee on Europe, Committee on International Relations, 107<sup>th</sup> Cong. (25 Apr. 2001) (testimony of Simon Serfaty, Director of the Europe Program for the Center for Strategic and International Studies).

<sup>252</sup> Maria Gavouneli, *International Law Aspects of the European Union*, 8 TUL. J. OF INT'L & COMP. L. 146, 155 (2000).

<sup>253</sup> Asteris Pliakos, *The Common European Policy on Security and Defense: Some Considerations Relating to its Constitutional Identity*, 6 COLUM. J. EUR. L. 275, 275 (2000).

## DRAFT

to pass this test. However, the EU is still a viable organization. It is strong enough to legitimately contend as a competitor to NATO in the future. Even now, the EU is influential enough to pose challenges to United States military operations, especially in the area of the NATO SOFA.

### V. EU-NATO SOFA Challenges

Whether the fear is justified or not, some fear that the EU will not allow the flexibility as which they feel has been a hallmark of NATO. Nowhere is this fear greater than in the United Kingdom

The problem has never arisen of Britain being asked to take action through NATO that it had no wish to take. Were this to happen, Britain could instead refuse and give notice of its intention to leave the organization. In contrast, Britain regularly has to do things under European law they disagree with or does not wish to do, and there is a legal structure in place to ensure it conforms.<sup>254</sup>

Against this backdrop of nervousness regarding the ultimate power of the EU, this article now looks at the potential challenges to the NATO SOFA from the EU.

#### A. The Overall Challenge: EU Goal for Uniformity of Laws

A main goal of the EU is harmonization of member nation laws and EU law. Under Article 307 of the Consolidated European Community Treaty, “To the extent that such

---

<sup>254</sup> JOHN REDWOOD, STARS AND STRIFE: THE COMING CONFLICTS BETWEEN THE USA AND THE EUROPEAN UNION 98 (2001).

DRAFT

agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.<sup>255</sup> The EU has taken an aggressive approach in trying to harmonize the member states' laws. Sometimes this takes the form of harmonization of major laws such as human rights.<sup>256</sup> Other attempts at harmonization do not involve such weighty matters. For example, on 12 March 2001, the EU Commission enacted a measure regarding the importation of wood packing comprised of non-manufactured coniferous wood originating in the United States, Canada, China, and Japan.<sup>257</sup> The rationale for this emergency measure was the possible danger of introduction of a parasite. This small parasite required the attention of the United States Department of Agriculture<sup>258</sup> as well as the European Command Judge Advocate.<sup>259</sup>

At the same time, the EU does acknowledge the NATO commitment of its member states:

---

<sup>255</sup> EC TREATY, *supra* note 154, art. 307.

<sup>256</sup> EU TREATY, *supra* note 154, art. 6.

<sup>257</sup> Commission Decision 2001/219/ of 12 March 2001, Temporary Emergency Measures in Respect of Wood Packing Comprised in Whole or in Part of Non-manufactured Coniferous Wood Originating in Canada, China, Japan and the United States of America, 2001 O.J. (L 81) 39.

<sup>258</sup> United States Department of Agriculture, *European Union Emergency Measures for Coniferous Non-Manufactured Wood Packing Material*, at <http://www.aphis.usda.gov/ppq/text/swp/eunmwp.html> (last visited Mar. 18, 2002).

<sup>259</sup> United States Air Forces in Europe, *United States Forces Activities and the European Union Update*, [https://aflsa.jag.af.mil/GROUPS/AIR\\_FORCE /USAFFEJA /JAI/Documents/EU/eu-update](https://aflsa.jag.af.mil/GROUPS/AIR_FORCE /USAFFEJA /JAI/Documents/EU/eu-update) (last visited Mar. 18, 2002).

## DRAFT

The policy of the Union in accordance with this Article shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.<sup>260</sup>

While the above language would appear to prevent any derogation of the NATO SOFA and supplementary agreements therein, it has not stopped nations belonging to NATO and EU from raising EU issues in regard to the NATO SOFA. Article 307 of the Consolidated EC Treaty provides the basis for the raising of EU law. Under this provision, EU states are to eliminate any incompatibilities with EU law.<sup>261</sup> Additionally, the laws of the Receiving State in the NATO SOFA often determine rights and procedures. Now that the EU law has so strongly permeated the laws of its member nations due to the concept of Primacy, EU member states believe they must conform all obligations to EU law. The tension between NATO SOFA obligation and the EU laws and policy is resolved in favor of the EU. Often, EU laws and regulations when implemented by the Member state do not have an impact on the NATO forces. However, there are areas, such as labor and environmental issues, in which the implementation of EU law presents difficult challenges to the NATO SOFA.

### B. Specific EU-NATO SOFA Challenges

#### 1. *Labor Policies*

---

<sup>260</sup> EU TREATY, *supra* note 154, art. 17.

<sup>261</sup> EC TREATY, *supra* note 154, at art. 307.

**DRAFT**

The United States has always relied on receiving state nationals to support its force abroad. This has meant working through local labor issues. However, now the EU has put its imprimatur on the local law regarding labor conditions. A common complaint regarding the EU regulation of labor is its preference for navigating in the weeds. An extreme example of EU intervention was in the area of worker safety:

The new directive on vibrations passed by the European Parliament on October 23rd is best understood as a landmark contribution to human welfare. In the name of protecting the health and safety of workers, the directive limits their exposure to vibrating objects. Many road hauliers and users of chainsaws, machine tools or dumper trucks will now find that the number of hours they can work will be cut. The EU argues that it has the right--nay the duty--to regulate such matters, both to protect workers and to ensure that all EU-based firms compete on a level playing field. Complying with this directive is likely to cost European industry billions.<sup>262</sup>

The issue of labor also raises an interesting issue about the EU: Its complicated bureaucratic structure. In the field of labor, there is the European Commission for Employment and Social Affairs; the European Foundation for the Improvement of Living and Working Conditions; the European Agency for Safety and Health at Work; the EU Parliamentary Committee on Employment and Social Affairs; and the Committee of the Regions Commission 6 on Employment, Economic policy, Single Market, Industry, and Small and Medium Sized Enterprises.<sup>263</sup> A military commander's legal staff must be

---

<sup>262</sup> *Bad Vibes*, THE ECONOMIST, October 27, 2001, available at LEXIS, News Library.

<sup>263</sup> European Union, *Employment and Social Affairs*, at [http://europa.eu.int/pol/socio/index\\_en.htm](http://europa.eu.int/pol/socio/index_en.htm); European Union, *European Union Parliament Committee*, at [http://www.europarl.eu.int/committees/empl\\_home.htm](http://www.europarl.eu.int/committees/empl_home.htm); European Union, *Committee of Region Commissions*, at [http://www.cor.eu.int/corz\\_en.htm](http://www.cor.eu.int/corz_en.htm). (last visited Mar. 18, 2002).

## DRAFT

prepared to consider all these organizations and their accompanying regulations just on the issue of labor.

### *2. Environmental Regulations*

The military is accustomed to dealing with the myriad of United States environmental regulations.<sup>264</sup> In Europe, the United States policy has been to conform as much as possible to the receiving state's laws.<sup>265</sup> However, the member state laws are increasingly being dictated by the EU. For example, the EU Parliament recently considered noise pollution regulations.<sup>266</sup> The European Parliament's Committee on the Environment is considering whether to introduce a genuine EU-wide policy for combating high levels of noise pollution. While the Committee, in a meeting on September 12, 2001, rejected amendments seeking to limit military airport activities due to sensitivity regarding the terrorist attacks launched against the United States, the lesson is clear that the EU has and will legislate on environmental matters.<sup>267</sup>

---

<sup>264</sup> See e.g. Clean Water Act, 33 U.S.C. § 1313 (2000); Endangered Species Act, 16 U.S.C. §§ 1531-1541 (2000); and Resource Conservation and Recovery Act, 42 U.S.C. §§6901-6992k (2000).

<sup>265</sup> DEP'T OF DEFENSE DIR. 6050.7, ENVIRONMENTAL EFFECTS ABROAD OF MAJOR DEPARTMENT OF DEFENSE ACTIONS para. 4.2 (Mar. 31, 1979).

<sup>266</sup> *Noise: Euro-MPs Urge Limit Values*, TRANSPORT EUROPE, Sept. 20, 2001, LEXIS, News Library, Most Recent Two Years.

<sup>267</sup> *Id.*

DRAFT

A second example of the EU impact in environmental area was the Flora, Fauna, and Habitat Directive.<sup>268</sup> This Directive required EU Member States to nominate areas to serve as wildlife refuges. Because of the detail of the Directive, Member States had less latitude than usual in implementing the Directive. Essentially, if an area met the stated requirements, then the Member State had to nominate the area. In this case, Germany ended up nominating two United States Army training grounds, Hohenfels and Grafenwoehr.<sup>269</sup> Germany authorities have expressed a willingness to work with Army officials on management of the area.<sup>270</sup> However, Army officials are concerned the EU Directive and slow pace of the EU bureaucracy may force the closure of the training grounds.<sup>271</sup>

Another aspect of the EU environmental impact on United States forces is the composition of the EU Parliament Committee on the Environment, Public Health and Consumer Policy. This committee has 59 members.<sup>272</sup> They range across the political spectrum. There are Conservative Party members from the UK and Green Party members from Germany. The interests these members represent are indeed divergent, but without earth shattering events like September 11<sup>th</sup>, they are not likely to give much thought to the

---

<sup>268</sup> Council Directive 92/43/ of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, O.J. (L 206) (1992).

<sup>269</sup> Sean D. Naylor, *Environmental Plan Poses Risk to Training*, Army Times, Oct. 23, 2000, at 18.

<sup>270</sup> Information Paper from USAREUR, European Union (EU) Directive for Flora, Fauna and Habitat (FFH) (Mar. 23, 2001), available at [https://aflsa.jag.af.mil/GROUPS/AIR\\_FORCE /USAFFEJA/JAI/index.html](https://aflsa.jag.af.mil/GROUPS/AIR_FORCE /USAFFEJA/JAI/index.html).

<sup>271</sup> Naylor, *supra* note 269.

<sup>272</sup> European Parliament Committee on the Environment, *Public Health, and Consumer Policy*, at [http://www.europarl.eu.int/committees/envi\\_home.htm](http://www.europarl.eu.int/committees/envi_home.htm) (last visited Mar. 18, 2002).

DRAFT

impact of their activities on United States military operations. Nor are the divergent interests likely to support military operations having any impact on the environment.

Finally, there is the proposal of the recent EU Environmental Liability Directive.<sup>273</sup> This directive would implement strict liability for certain polluters. Conceivably some of the United States military operations could in effect fall into this category of polluter. If the proposal is implemented, the directive will in effect be a European CERCLA.<sup>274</sup>

Quite simply, it will become harder for United States forces to keep up with environmental regulations. Commanders will need to deal with local authorities. They will also need to deal with national authorities. Finally, they will need to be cognizant of the increasing EU influence in the environmental arena. Like the labor arena, the environmental regulation is increasingly dominated by numerous regulations.<sup>275</sup> The United States military must develop approaches to deal with these regulatory challenges.

## VI. Potential Approaches

The United States has three options in dealing with EU issues in regard to the SOFA. First, it can promote NATO exemptions to EU legislation. Second, it can take a more drastic

---

<sup>273</sup> White Paper Proposal for a Directive of the European Parliament and of the Council on Environmental Liability with Regard to the Prevention and Restoration of Environmental Damages COM (00) 66 final, available at <http://europa.eu.int/comm/environment/liability/> (last visited Mar. 20, 2002).

<sup>274</sup> *Id.* at 10.

<sup>275</sup> European Union, *Eur-Lex Directory of Community Legislation in Force: Environment, Consumers, and Health Protection*, available at [http://europa.eu.int/eur-lex/en/lif/ind/en\\_analytical\\_index\\_15.html](http://europa.eu.int/eur-lex/en/lif/ind/en_analytical_index_15.html) (last visited Mar. 19, 2002).

DRAFT

approach and negotiate a SOFA with the EU. Finally, the United States can continue their ad hoc approach to dealing with the EU.

#### A. NATO Exemptions

It is quite possible that the United States could work exemptions from those EU laws detrimentally impacting its military operations. The authority for such exemption under EU law would have to be the EU treaty language regarding the EU observation of member states' obligation under NATO. Constant vigilance will be necessary to keep on top of the ever-increasing EU legislation. However, it can be done. For example, the European Commission specifically exempted the vehicles of NATO personnel from the European Union motor vehicle insurance regulations.<sup>276</sup>

The problem with NATO exemptions is if the US has agreed to respect receiving nation law under the SOFA, how do we pick and choose between receiving nation and EU laws? More importantly, some of the commentators may be correct in stating that EU law has eliminated the sovereignty of the member nations. Thus, perhaps the state law that we are to respect is actually that of the EU. Thus, if there is a contradiction between state law and EU law, which law does the United States follow? The United States would be bound to respect the state law. The problem is that the United States knows that sooner or later the state will

---

<sup>276</sup> European Commission Decision 91/323 of May 30, 1991 Member States Laws Relating to Insurance against Civil Liability in Respect of the Use of Motor Vehicles and to the Enforcement of the Obligation to Insure against Such Liability, 1991 O.J. (L 177) 25.

DRAFT

have to comply with the EU law. The analysis of the EU law interface with the member state law can be dizzying.

Equally difficult to working NATO exemptions to EU laws is the amount of directives, regulations, and decisions the EU produces each year. In February of 2002, the EU Council legislated over 30 regulations and decisions.<sup>277</sup> Granted, some of the legislation will not impact the United States military forces. However, the numerous documents must be screened and analyzed by United States officials. The burden will be significant on the legal staffs of the State Department and Department of Defense.

## B. EU SOFA

Another potential solution is to recognize that the EU may be the government of the future for Europe. There are those who see the demise of NATO as a viable organization, “Recent months have seen an undermining of NATO’s relevance and the humiliation of its European members. On September 12, they for the first time invoked the NATO treaty’s mutual self-defence article, only for Washington to treat their move as a symbolic gesture of solidarity.”<sup>278</sup> Additionally, there are many who believe the United States would be happy to see Europe handle security issues on its own. As one UK observer of NATO has observed, “US citizens long to be relieved of the burden of rescuing Europe, and instead cooperate and

---

<sup>277</sup> Council of the European Union, *Monthly Summary of Council Acts*, Feb 2002, available at Council of the European Union, *Public Register of Council Documents* (last visited Mar. 19, 2002).

<sup>278</sup> Editorial, *Reforming NATO*, FINANCIAL TIMES (LONDON), Feb. 8, 2002, at 18, LEXIS, News Group File. See also *Only Two NATO Members Increased Armies: Greece and Turkey*, TURKISH DAILY NEWS, Dec. 24, 2001, LEXIS, News Group File. (Comparing numbers of soldiers and the share of the defense expenditure from Gross Domestic Product between the years 1994 and 1999).

DRAFT

trade with a continent as free and democratic as their own. . . . Washington has come to regard European integration as a means toward that end.”<sup>279</sup> If the critics are correct, and the NATO star is waning, then a SOFA negotiated with the EU would make sense. However, there are several issues. The EU is a large organization with numerous and complicated levels of organization. With which agency of the EU would negotiate a SOFA? Could member states opt out? Would a SOFA with the EU be detailed or would it let the details lie in supplemental agreements like the NATO model? Could there be supplemental agreements under a EU SOFA?

The United States would probably have to contact most EU agencies trying to influence legislation unfavorable to our forces stationed in Europe. The EU legislative process is very long. It depends greatly on the inputs from its different governing bodies. Even its information and research agencies provide valuable subject matter input.

There is a significant problem with either negotiating exemptions with the EU in regards to NATO SOFA or even negotiating a EU SOFA. With either scenario, the United States has less bargaining power with the EU than it does with individual member states. Additionally, the United States is a dominant member of NATO and is able to wield its influence in NATO matters. Not being a member of the EU puts the United States in a situation of “us against them.” Less bargaining leverage means less advantage to military organizations and the

---

<sup>279</sup> Bill Cash, *European Integrations: Dangers for the United States*, 1 CHI. J. INT'L L. 315, 315 (2000) (Cash is a member of the UK Parliament).

DRAFT

military members and civilian component attached. If the US were to ever reduce its military presence in Europe, the prospects of decreased bargaining leverage would be very real.

On the other hand, perhaps a SOFA with the EU overestimates the power of the EU. While some believe the EU is dissolving the sovereignty of Member States, others believe the major economic power of certain Member States gives them advantages not realized by other EU nations. For example, Germany was able to ignore a recent attempt by the EU Commission for Economic and Monetary Affairs to coerce Germany into reducing its national deficit.<sup>280</sup> Time will only tell whether the EU's central organization will come to dominate all member nations, including the economically stronger member countries. Thus, the decision to negotiate a SOFA with the EU involves a certain gamble on which "horse" will win: The centralized supranational organization of the EU or the sovereignty of the member nations. This gamble will be a very risky one. It involves the decision to place less importance on the NATO alliance. It is important to remember that this is an alliance that has served its members well for over half a century. Additionally, it involves placing our faith in the prospects of an organization unique in modern history. Given the rapid changes experienced since the end of the Cold War, it may be too early to place any faith yet.

### C. Continuing Business as Usual

Maybe no change in United States policy is needed. The United States can continue to monitor the EU regulations for potential impact on its military operations in Europe. There is

---

<sup>280</sup> *Promises, Promises, Fudge, Fudge*, THE ECONOMIST, Europe Section, Feb. 16, 2002, LEXIS, News Groups.

DRAFT

a significant problem with this approach however. Keeping up with the dizzying amount of EU regulations and their implementation in member states will keep the military commander's legal staff continually occupied. The original purpose of the NATO SOFA was to make the military commander's administrative burden simpler. That purpose is increasingly hard to fulfill in those countries that are members of both EU and NATO.

Staying the course will require the United States representatives to argue that our forces in the receiving state are complying with EU law. This is especially true in the case of EU Directives. While our forces may not always follow the exact bureaucratic procedures implementing a Directive, we do observe the end result intended. Of course, this contention runs counter to the belief of those who argue that NATO SOFA Article II use of the word "respect" requires strict observation of the receiving state law. Nevertheless, it is important to carefully distinguish between EU Directives and Regulations. Otherwise, the receiving nation may blend the distinction to their negotiating advantage.

If the United States decides to stay the current course, more resources will be needed to interact with the European Union on SOFA issues. Currently, the United States Mission to the European Union is the lead American agency for interaction with the European Union.<sup>281</sup> On the military side, European Command (EUCOM) is the lead United States military agency for dealing with the EU.<sup>282</sup> On legal issues, a military attorney assigned to the Staff Judge Advocate of EUCOM works EU issues with the military lawyer assigned to the

---

<sup>281</sup> Telephone Interview with Lt Col Albert Klein, *supra* note 247.

<sup>282</sup> *Id.*

DRAFT

United States Military Delegation to NATO.<sup>283</sup> These two attorneys are assisted by attorneys assigned to subordinate commands of EUCOM.<sup>284</sup> Unfortunately, there are no military attorneys assigned to United States Mission to the European Union.<sup>285</sup> This gap needs to be rectified. The absence of a point of contact this close to the European Union is detrimental to monitoring EU legislation as well as representing United States military interests. A close working relationship with the EU is needed to alert the EU of potential ramifications of legislation on United States military activities.

## VII. Conclusion

In 1953, let alone 1983, no one could have predicted the complete fall of the Soviet Union and the Communist Bloc. However, the World has changed dramatically since the North Atlantic Treaty and the subsequent NATO SOFA. The NATO SOFA was a groundbreaking document in that for the first time, an agreement successfully governed the peacetime basing of foreign troops in countries. The NATO SOFA has served the United States and its NATO allies well during its almost 50 year existence.

Likewise, if someone had predicted in 1953 that in 2002 the Deutsch Mark, Franc and Lira would dissolve into history to be replaced by a single currency shared by 12 European nations, that person would have been ridiculed. Yet the European Union has made this

---

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

DRAFT

happen. Whether the European Union has been a success is still under debate. However, no one can deny its relevance.

In its almost 50 years, the NATO SOFA has never been called ineffective, but if the NATO SOFA fails to adapt to the European Union, that label may attach to it. The United States still has a viable interest in basing military personnel in European countries. Currently, the only way of protecting the interests of the United States as well as the interests of its service members is through the NATO SOFA. Until Europe is ready to throw in the towel on NATO, the United States must take a firm stance on its rights under the NATO SOFA. Otherwise, it will have de facto agreed to a EU SOFA.